IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 626 of 1997
in
SPECIAL CIVIL APPLICATION No 7878 of 1996

WITH
LETTERS PATENT APPEAL No.109 of 1999
in
SPECIAL CIVIL APPLICATION No.1848 of 1997

WITH
CIVIL APPLICATION No.5597 of 1997
in
LETTERS PATENT APPEAL No.626 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA
and
Hon'ble MR.JUSTICE R.R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

BHIKAJI MAGANJI THAKORE

Appearance:

LPA No.626 of 1997
Ms.Harsha Devani, ASSTT GOVERNMENT PLEADER for Appellants.
MR YN OZA, Senior Counsel with Mr.Pitamber Abichandani for Respondent No.1.

LPA No.109 of 1999

Ms.Harsha Devani, Asstt. Govt. Pleader for
appellants.
Mr.Y.N. Oza, Senior Counsel with Mr.R.J. Oza,
for respondent no.1.
Mr.Y.N. Oza, Senior Counsel with MR MANOJ N POPAT
for Respondent No.2 in LPA No.109/99.

No one appeared on behalf of the other respondents
in LPA No.109 of 1999 despite service.

CORAM : MR.JUSTICE M.R.CALLA
and
MR.JUSTICE R.R.TRIPATHI

Date of decision: 24/08/2000

COMMON ORAL JUDGEMENT : (Per M.R. Calla, J.)

In Letters Patent Appeal No.626 of 1997, the order passed by the learned Single Judge in Special Civil Application No.7878 of 1996 dated 4.2.1997 is under challenge. In Letters Patent Appeal No.109 of 1999, the order dated 3.8.1998 passed by the learned Single Judge in Special Civil Application No.1848 of 1997 following the judgement and order dated 4.2.1997 in Special Civil Application No.7878 of 1996 is under challenge. Therefore, we propose to decide both these Letters Patent Appeals by this common judgement and order.

2. In Special Civil Application No.7878 of 1996 a question arose as to whether the land bearing Survey No.69 situated at Ghatlodia, Taluka, City, District Ahmedabad is a new tenure land or not. In Special Civil Application No.1848 of 1997, the question was as to whether the land bearing Survey No.74 situated at village Ghatlodia, Taluka, City, District Ahmedabad is a new tenure land or not.

LETTERS PATENT APPEAL No.626 of 1997.

3. It is agreed that initially there was a dispute in respect of the nature of the tenure of the two pieces of land bearing Survey Nos.68 and 69. So far as the land bearing Survey No.68 is concerned a finding was given by the concerned authorities that it was not a new tenure land and therefore, the dispute remained only with respect to land bearing Survey No.69. The whole dispute centres round the mutation entry no.809 dated June 2, 1956 under which the said land has been described as the

land of new tenure. Before the learned Single Judge the history of the land bearing Survey No.69 was sought to be traced and on behalf of the State it was pointed out that in "Kayam Kharada" there was a note to the effect that the land bearing Survey No.69 would be the land of new tenure. With regard to this land, i.e. Survey No.69 there was an entry saying "Na- Sa", i.e. "Navi Sharat" or new tenure. The learned Single Judge, after perusing the entire record which was made available to him and after hearing the learned counsel who appeared on behalf of the State of Gujarat came to the conclusion that there was nothing on record to justify the posting of mutation entry no.809 dated June 2, 1956 saying that the land bearing Survey No.69 would be a land of new tenure. A contention was raised before the learned Single Judge by the learned Govt. counsel that there could be a miscellaneous alienation in favour of the original holder and that said alienation would have been abolished and for this purpose reliance is placed on the provisions of the Bombay Merged Territories Miscellaneous Alienation Abolition Act, 1955. However, this contention did not find favour with the learned Single Judge and in our opinion rightly so on the ground that there was absolutely no material to warrant a conclusion that there was alienation in favour of anybody including the original occupant or the land holder and that later on said miscellaneous alienation came to be abolished under the said Act of 1955. This contention was rejected by the learned Single Judge in absence of any material in support of it. We do find that in absence of any material on record, rejection of this contention by the learned Single Judge is absolutely right. There is no basis to hold that the land in question is a new tenure land merely because there was a short note in the "Kayam Kharada" and subsequent mutation entry no.809 dated June 2, 1956. Even during the course of hearing of this appeal, we called upon the learned Assistant Govt. Pleader to substantiate as to what was the source or the authority for the purpose of making the said note in the "Kayam Kharada" and the subsequent mutation entry no.809 dated June 2, 1956 so as to take the land in question to be a new tenure land and also to explain that when the land bearing Survey No.68 which was identical to that of Survey No.69 was taken as a land of old tenure by the Government itself, how the case of the land of Survey No.69 was different, but no explanation has been given and no material has been furnished and no record has been made available even before us to justify the difference of two views for identical lands. However, learned Asstt. Govt. Pleader has argued that several orders have been passed by various authorities right from the

City Deputy Collector, Collector and the Govt. in Revision time and again and therefore, this Court while examining the matter under Article 226 of the Constitution of India should not go into the factual aspect with regard to the entry no.809 dated June 2, 1956 so as to set aside it and for that purpose the procedure as has been prescribed under the Bombay Land Revenue Code should have been followed and the appellants ought to have challenged this entry in accordance with the procedure prescribed under the Code, and this Court should not have taken the exercise for quashing the said entry in writ jurisdiction. In support of this submission, learned counsel has cited a decision of the Supreme Court in the case of H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority, Karnal and others v. M/s Gopinath & Sons and others, reported in 1992 Supp. (2) SCC 312. In this case of H.B. Gandhi (supra) the Supreme Court has observed that it is a judicial review of the decision making process and not of the decision itself, that High Court cannot reappreciate the primary or perceptive facts found by the fact finding authority under statute and where hierarchy of appeals is provided by the statue and the statutory remedy is there, it must be first exhausted. The principle of judicial review and exhaustion of the statutory remedy is settled. However, in the facts of the present case we find that there is no question of review of the decision. The question as to whether the land in question was a new tenure land or not on the basis of the mutation entry no.809 dated June 2, 1956, had been gone into in several proceedings and a reference in this regard may be made to the order passed by the Secretary, Revenue Department (Appeals) dated 9.3.1994 as Annexure 'A' with the petition, wherein it is stated in para 2 that entry no.809 had been made without giving any prior notice as required under sec.135D of the Land Revenue Code, that the factors and the grounds for which land under Survey No.68 has been found to be of old tenure had not been taken into consideration by the City Deputy Collector with regard to the land bearing Survey No.69. In this very order dated 9.3.1994, it was further mentioned in para 5 that no Sanad had been issued with regard to the land of this Survey No. in which it was registered as a new tenure land or that the Govt. had granted this land or that it was by way of Inam or Jagir under the Tenancy Act or that it was a case of regrant and there was no such order with regard to the land of Survey Nos. in question. It has been then recorded in this order dated 9.3.1994 that the purchasers of this land were the employees of Ahmedabad Municipal Corporation, and they had constructed their houses and were living there. They

were bona fide purchasers of the land in dispute and in case now this land is treated as Khalsa land they will be subjected to great financial loss and therefore, the matter was required to be considered sympathetically. It was after this order dated 9.3.1994 that proposals were made by the Collector, Ahmedabad on 22.4.1994. There is also a document dated 22.7.1994 annexed with the Special Civil Application at Annexure 'E', i.e. the letter written by the District Inspector of the Land Records sent to the Municipal Employees, in which there is a categorical mention about both the survey nos.69 and 74. After considering the "Kayam Kharda" for the purpose of verification there was nothing in the record to show that the lands of survey nos. mentioned in this letter including survey nos.69 and 74 were registered as new tenure lands. Even in the order passed, way back on 14.8.1992 by the Deputy Collector, it has been mentioned with regard to entry no.809 dated 2.6.1956 that it had percolated from the past. It is, therefore, clear that what was the basis of entry no.809 and as to whether this entry had any source in the record was a question which had been considered by various authorities while passing orders. Therefore, when the mater came up before the learned Single Judge, the learned Single Judge on the basis of the record and after hearing the parties could certainly examine this question as to whether this entry had any basis or not?
After hearing all the parties and after perusing the record, the learned Single Judge found that such entry had no basis, and therefore, the same was liable to be set aside. It, therefore, cannot be said that the learned Single Judge has overstepped the limits of the judicial review.

For the reasons aforesaid, we find that there is no scope for interference with the view taken by the learned Single Judge. We agree with the reasons given by the learned Single Judge and the conclusion arrived at by him. Reliance has been placed by Mr.Oza, Senior Counsel, on the decision in the case of the Comptroller and Auditor General of India, Gian Prakash, New Delhi and another v. K.S. Jagannathan and another, reported in AIR 1987 SC 537. In this case while considering the scope of Article 226 of the Constitution, the Supreme Court has expressed in no uncertain terms that the High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent

injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Govt. or the public authority should have passed or given had it properly and lawfully exercised its discretion. In the facts of the present case the matter had been litigated for number of years. The matter was remanded and re- remanded and it was considered more than once by the appellate as well as revisional authorities, namely, the Collector and the Govt. itself and after such a series of screening when the matter came up before the learned Single Judge under Article 226 of the Constitution, he found that there was no basis to sustain entry no.809 and he has set aside the same, then how can it be said that he has overstepped the limits of judicial review. We also do not agree with the learned Asstt. Govt. Pleader that for the purpose of challenging this entry the parties should have been relegated even at this stage to undergo the whole exercise afresh and allow the lis to continue, more particularly when the Govt. had nothing with it on record to support the said entry before the learned Single Judge and so is the case even before us

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4. This was with regard to land bearing Survey No.74. It is very clear from the impugned order dated 3.8.1998 that the facts were identical. The facts with regard to the land bearing Survey No.74 are also identical as are obtaining in the case of land bearing Survey No.69. In para 9 of the judgement, the learned Single Judge has categorically mentioned that the learned Asstt. Govt. Pleader was not in a position to produce any record to show as to why new tenure entry was made in respect of land of Survey No.74 or any other land covering entry no.809. Therefore, it was not possible to distinguish this case from the case as it was in Special Civil Application No.7878 of 1996. The learned Single Judge has also given reasons at item no.(iii) in para 10 of the judgement as to why the petition could not be thrown on the ground of delay and following the order passed in Special Civil Application No.7878 of 1996 dated 4.2.1997, he has allowed the petition. We do not find any reason to take a view different than what has been taken by the learned Single Judge.

5. There is no merit in either of these two appeals. Both these appeals are accordingly dismissed in the facts of the case. No order as to cost.

6. Civil Application No.5597 of 1997 stands disposed

of as the main Appeal has been dismissed. Notice is discharged.

7. Since both the Letters Patent Appeals have been dismissed, any interim order passed in any Civil Applications in these matters, automatically comes to an end.

(M.R. Calla, J.)

24th August 2000 (Ravi R. Tripathi, J.)

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